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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(San Joaquin)

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In re DAVID GARY PEASLEE on Habeas Corpus

C069693

(Super. Ct.  
No. 33318)

The Board of Parole Hearings (Board) “grappled back and forth” before denying parole to petitioner David Gary Peaslee who was found to be “very, very close” to receiving parole for a second degree murder committed in 1981. The Board ultimately concluded that petitioner posed a threat to public safety because he did not begin participating in substance abuse programs until 2008. The Board reasoned that petitioner’s delay in enrolling in substance abuse programs meant that he had not yet had enough self-help programming to ensure his gains from the programs would be “maintained over time.” The Board also considered static factors including the nature of the commitment offense, the trivial motive for the murder, and petitioner’s pattern of escalating criminality based on his juvenile record and unstable social history.

In this petition for writ of habeas corpus (habeas corpus petition), petitioner contends the Board's conclusion lacked any evidence in support of its decision to deny parole. He further argues that the denial rests on the static factors surrounding the commitment offense, ignores favorable psychological evaluations concluding that he presented a low risk of criminal recidivism, and failed to draw a rational nexus between the recent participation in substance abuse programs and the potential threat of future violence.

Heeding the recent guidance of our Supreme Court, we review "whether the evidence supported a finding that petitioner posed a current threat to public safety . . . ." (*In re Shaputis* (2011) 53 Cal.4th 192, 199 (*Shaputis II*)). In doing so, we are mindful that "it is not for the courts to reweigh the evidence before the Board . . . ." (*Id.* at p. 199.) Nonetheless, as the high court has reiterated, "the 'some evidence' standard 'certainly is not toothless.'" (*Id.* at p. 215, quoting *In re Lawrence* (2008) 44 Cal.4th 1181, 1210.)

After examining the record, we conclude that no evidence supports the Board's denial of parole based on petitioner's "late" participation in substance abuse programs. Nothing in the record indicates that drugs or alcohol played a role in petitioner's commitment offense or that he ever had a substance abuse problem. Thus, the Board's stated concerns about petitioner's substance abuse lack evidentiary support. We also reject the Board's reliance on the circumstances of the commitment offense and static factors to support the denial because there is no modicum of evidence to support a rational

nexus between those facts and current dangerousness.

Accordingly, we grant the petition for writ of habeas corpus.

#### BACKGROUND

##### *Procedural History*

A jury convicted petitioner of first degree murder and robbery in 1983. In an unpublished decision, this Court reversed the convictions for lack of a unanimity instruction. After the case was remanded, petitioner entered a plea to second degree murder. His minimum eligible parole date was in 1992.

At petitioner's first parole hearing in 1991, he was denied parole for a year and directed to enroll in a Category "T" program.<sup>1</sup> Petitioner participated in the program, which involved rational behavior training including "Criminal Thinking I and II, anger management," and "Alternatives to Violence." In 1992, he was denied parole in order to complete the Category "T" program. In 1994, petitioner agreed to a one-year denial based on a disciplinary action arising out of a dispute with his cellmate who was smoking in a nonsmoking area. In 1996, petitioner received a "128" counseling "chrono" for "aggressive behavior." Petitioner has not had any disciplinary actions since then. In 1999 and 2001, petitioner was denied parole and admonished to engage in self-help programs. In 2004, he was

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<sup>1</sup> "A Category 'T' program is for male inmates with identified psychiatric problems requiring outpatient group therapy. (Cal. Dept. of Corrections, Operations Manual (Jan. 2010) Adult Classification, § 62080.12 p. 575.)" (*In re Powell* (2010) 188 Cal.App.4th 1530, 1535.)

denied parole to get an update to his psychological report. In 2006, he was denied parole with no new admonitions.

Petitioner was denied parole in November 2008 and admonished to engage in self-help programs, earn his general educational development (GED) certificate, get a new psychological evaluation, and -- for the first time -- participate in Alcoholics Anonymous (AA) and Narcotics Anonymous (NA). Petitioner immediately enrolled in AA and NA. Due to a waiting list, petitioner was not able to begin attending AA until February 2009. Petitioner earned his GED in 2009.

In October 2009, the Board denied parole for three years. In June 2010, petitioner sought habeas corpus relief, which was denied by the trial court in October 2010. In November 2010, petitioner filed a habeas corpus petition with this court. At this court's request, the People filed an opposition. Petitioner subsequently submitted a reply. This court issued an order to show cause, with the return by the People to be filed in the trial court.

Petitioner requested and was appointed counsel in the trial court. The People filed a return and petitioner filed a traverse. In October 2011, the trial court denied the habeas corpus petition. The court reasoned, "Given the presence of alcohol/drugs in the crowds that Petitioner associated with and his admission that in the past and prior to his incarceration, he drank and used drugs, the Board's determination that more programming is needed in the area of alcohol/substance abuse is not unfounded. While some reports (Pritchard's 2009 evaluation) questioned why alcohol/substance [abuse] was an issue, other

reports (the Group Therapy CAT-T report) specifically noted that Peaslee acknowledged use of alcohol and marijuana at 16 or 17, and denied a '*significant*' history of alcohol or drug '*abuse.*' The CAT-T report further noted that the murder victim was a *drug dealer*. Moreover, the facts of the commitment offense established that after killing the victim, Petitioner and his co-defendant stole the victim's *methamphetamine.*"

In November 2011, the present petition was filed with this court.

*Petitioner's Criminal History Prior to the Commitment Offense*

Petitioner was 13 years old when he "started getting in trouble." As a juvenile, he committed a child molestation, auto theft, and two burglaries. Petitioner twice ran away from his juvenile camp placements. Petitioner explained that he got into trouble because he felt "left out" when his parents divorced and he was abandoned by his father. At the time of the commitment offense, petitioner was not on any form of supervised release and his prior juvenile record had been expunged.

*The Commitment Offense*<sup>2</sup>

Sometime in early 1981, petitioner sold a 1969 Camaro to the victim, Bradley Greene, on the condition that the car be used for parts. Petitioner believed Greene breached that condition and planned to "get the car back." On August 20, 1981, petitioner learned that the car was parked in front of Steven Gregory's house. Petitioner contacted Deadru Tinga for

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<sup>2</sup> The facts of the commitment offense are taken from this court's unpublished opinion issued on April 24, 1987.

help in recovering the car. While en route to the car's location in Stockton, petitioner explained to Tinga "that he planned to use force if necessary to recover the Camaro." Petitioner also told Tinga that "he had a 'deal' with Greene which involved guns and drugs." The deal was a ruse to rob Greene of the cash without providing the promised M-16 automatic rifles.

The scheme announced to Tinga was not petitioner's first plan to rob Greene. Petitioner had earlier devised a plan with Steven Gregory to rob and kill Greene after Greene obtained the money to buy the guns. The earlier plan had been abandoned on the day before petitioner enlisted Tinga to help rob Greene.

At Gregory's house, Tinga, Gregory, and petitioner went into a back bedroom to locate a bag of marijuana while Greene remained in the living room. Petitioner also was looking for methamphetamine that Gregory reported Greene to have. Petitioner announced, "We'll get him out in the car, you'll see the signal, you'll know. And we'll take care of him out there." Petitioner, Tinga, and Greene went out to the garage where petitioner hit the victim in the face twice. Tinga placed Greene in a "head-lock" and petitioner hit the victim in the face five or six more times. While Tinga held Greene down, petitioner -- who weighed 300 pounds at the time -- jumped up and down on the victim six or seven times.

Tinga testified that Greene was rendered unconscious and gasping for air. Petitioner directed Greene to be loaded into petitioner's car. While the victim was being placed into the car, petitioner kicked him in the head several times. Tinga and

defendant drove to Bear Creek. There, they removed a wallet, cigarettes, and a small bag of methamphetamine from Greene's pockets. Petitioner dragged Greene out of the car and shot Greene "several times in the head."

On the way back to Gregory's house, Tinga counted \$600 to \$700 in Greene's wallet. At the house, Gregory and Tinga searched for an ounce bag of methamphetamine that petitioner believed Greene to have stashed there. Petitioner gave Tinga and Gregory \$200 each.

Realizing that petitioner had left expended shotgun shells at the scene, Tinga and Gregory returned to Bear Creek. There they unsuccessfully searched Greene's pockets for the missing methamphetamine. They gathered the shotgun shells and returned to Gregory's house.

Petitioner testified that Greene was already dead when Tinga released him from the head-lock. He further stated that it was Tinga who pulled Greene's body from the car and that no shots were fired in his presence. It was only later that petitioner saw Tinga and Gregory return from an errand to buy beer that he saw them covered in blood. However, petitioner acknowledged searching for Greene's methamphetamine at the house.

At trial, a pathologist testified that Greene died of gunshot wounds, not choking.

In a special finding attached to the verdict, the jury found that petitioner did not personally kill Greene. The jury was unable to agree whether petitioner intentionally aided and abetted the killing.

### *Petitioner's History During Incarceration*

Shortly after being sent to prison, petitioner joined the Aryan Brotherhood. In 1985, petitioner received a disciplinary action for an altercation with another inmate. When the Aryan Brotherhood ordered petitioner to kill someone, petitioner decided to quit the gang. Petitioner engaged in a nearly three-year debriefing process from 1985 to 1988. He received another disciplinary action in 1994, when he caught his cellmate smoking inside the facility after smoking had been banned indoors.

Petitioner demonstrated an excellent work ethic in prison industries, including in the knitting mill and shoe factory. In addition to earning his GED certificate, petitioner completed several units of college credit and vocational training in dry cleaning, lead abatement, and forklift safety.

In 1991 and 1992, petitioner participated in the Category "T" program, which included one year of participation in psychological assessment and group therapy. Between 2001 and 2006, petitioner participated in the following self-help and therapy groups: Alternatives to Violence Project Basic Workshop; Victim Awareness Mini-Workshop; Personal Growth Seminars video series; Language of Work, Family Secrets, Life Skills, and Anger Management; and 44 months of Process Group Therapy. In November 2008, a week after the 2008 Board hearing, petitioner started participating in NA. Petitioner also signed up for AA a week after the 2008 Board hearing, but there was a wait list. In February 2009, petitioner started participating in AA.



### *Petitioner's Psychological Evaluations*

The petitioner received psychological evaluations in 2001, 2006, and 2009. None of the evaluations found that petitioner ever had a substance abuse problem. To the contrary, beyond trying marijuana as an adolescent, petitioner had no history of illicit drug use.

Although petitioner consumed some beer on the day of the commitment offense, none of the psychological evaluations concluded that alcohol had any influence on petitioner's commitment offense. Petitioner's 2006 psychological evaluation recounts his history with drugs and alcohol as follows:

"[Petitioner] was asked to comment on the relationship between substance abuse and the commitment offense. He responded, 'I drank beer and Jack Daniels every now and again on social occasions. I drank a six-pack over a day each on the weekend and the Jack Daniels once or twice a month at dinner, about two drinks each time. I smoked marijuana in high school and not any after that. There was no other drug use. I don't think I had a substance abuse problem. The [probation officer's report] says I had no use either.'

"He was asked whether he had been drinking the night of the commitment offense. He said, 'I had a couple of beers that night. When I went to the house where the incident took place, I was not intoxicated. I don't think alcohol was a factor in the crime.'

"Based on this response and available documentation, it would not seem that substance abuse was a factor in the commitment offense.

"[Petitioner] was asked if he could comply with parole conditions to refrain from drinking alcohol or using drugs. He stated, 'I don't plan to go out drinking, with my health issues I can't even if I wanted to, and I don't want to.'

"By self-report and available documentation, [petitioner] did not have a substance abuse problem while living in the community. There is no reason to believe [petitioner] would begin to abuse drugs or alcohol if released to the community."

The 2009 psychological evaluation similarly noted: "Substance-abuse has never been identified as a particular problem for [petitioner]. He had some social drinking and experimental drug use in adolescence but the [probation officer's report] (as referenced below) found, 'The [inmate] claimed moderate, social use of alcohol and no drug involvement whatever. These claims appear to be well substantiated by statements of people who knew him well.' He has no history of substance related infractions in [the Department of Corrections and Rehabilitation]." The 2009 evaluation continued, "Substance-abuse did not reportedly play a role in [petitioner]'s commitment offense. As there is no evidence of previous or present problem, no recommendations are made concerning the need for any treatment in the community."

The 2009 evaluation concluded that petitioner "is in the low risk need level for recidivism." The 2009 report also noted that petitioner had been previously assessed to fall into the low or low to moderate category of risk for criminal recidivism. The report concluded: "[Petitioner] presents a **LOW RISK** for violence in the free community. Following the trend shown in

the previous Board reports, he has continued to lower his dynamic risk factors and to demonstrate sustained pro-social behavior and attitudes. [¶] His risk of violent recidivism would increase if he: found himself without a permanent residence, income sufficient to meet his living expenses, and/or social support in the community; and if he is unable to get the supportive and medical services he requires for his [chronic viral infection]; [¶] He could decrease his risk of violence if he: found meaningful and rewarding vocational and/or volunteer positions bolstering self esteem and a sense of belongingness; and developed a clearer understanding of the erroneous thoughts and high risk situations which produced his previous antisocial behavior and coping responses to address these issues; and established communication and acceptance with supportive and monitoring individuals and groups in the community."

*The Board's 2009 Hearing*

In response to questioning during the 2009 parole hearing, petitioner acknowledged that he "smoked some weed in high school" but asserted, "I was never involved in drugs." Petitioner denied that alcohol played a role in the commitment offense. Petitioner noted that he had successfully completed anger management classes and was participating in AA and NA. Petitioner also explained that the plan to rob Greene was never "about any drugs" but only about the Camaro sold to Greene. He expressed remorse for the commitment offense, which the Board found to be genuine.

Petitioner introduced letters of support from his family members and a friend. He also articulated a plan to live with his mother and stepfather if released on parole.

The Board denied petitioner parole for the minimum term of three years based on the conclusion that he would pose an unreasonable risk of danger to society if he were released. The Board informed petitioner, "the main thing is, . . . you are so close; we had a difficult time. Our concern is, is that your self-help participation is recent, you really started self-help on December 31st, 2003 . . . . It was not until after the last Parole Board hearing, November, last year, the 14th to be exact, that you began your participation in AA or NA." The Board explained further, "Like today, you said that you used alcohol, periodically, a beer after work, what have you, a couple on the weekends; alcohol was involved in the life crime. And up until one week after your last hearing last year, was the first time you really began dealing with substance abuse or the use of substances. And that is certainly a concern of the Panel because alcohol was present at the time of the life crime, and we believe that you're minimizing it as far as its influence. You said that in the past you smoked some marijuana, but essentially denied that either one of these substances is -- or has been a problem for you. We believe that it most likely was, particularly, since there was alcohol involved at the time. And the concern of the last Panel is the same, but you did immediately, since last November '08, begin some participation, and you talked about the Steps. So, you have involved yourself, but it's been a long, long time that you had an opportunity to

do that and get all that handled so that we know the gains you've made in regards to that situation, so far, they're very recent, and we need to see that they're maintained over time." The Board also was concerned with the fact that defendant's participation in self-help (apart from substance abuse) had begun only in 2003.

The Board further noted, "We grappled about your case back and forth quite a bit, . . . and the common thing that we did see in there is that, you know, we went through [the] transcripts and we went through different versions of the crime; alcohol was involved in the crime. Okay? From what the documentation that we have is, we can't tell you how much was involved, how much your participation was involved; we knew it was involved. The Panel at your last hearing knew that it was involved. So, I said, well, maybe you had a little lapse, there, in your AA or NA; I went through this file, I went through that file, I went all the way back to '83 and I saw no NA or AA; I didn't see anything." The Board stated that "we just encourage you to continue with self-help because the more self-help you get, the more insight you have." The Board acknowledged that, after his last denial of parole, petitioner was "going to NA and within six days [he was] going to NA, within seven day[s he] was on the list for AA."

The Board also considered static factors, including the fact that the victim in the commitment offense had been "beaten severely and then shot and killed and left at Bear Creek," the motive was trivial, and petitioner had a pattern of escalating

criminality based on his juvenile record and unstable social history.

In petitioner's favor, the Board found that petitioner was being honest in answering its questions and that his expressions of remorse appeared to be genuine. The Board also commended petitioner on remaining free from rules violations for a long period of time and his acquisition of employment skills. Moreover, the Board noted that petitioner had the support of his family and a plan for where he would reside if he were granted parole. Finally, the Board noted the favorable psychological evaluation that concluded petitioner had a low risk of recidivism.

## **DISCUSSION**

### **I**

#### *Principles of Review*

In deciding whether to grant or deny parole to a prison inmate, "the Board must determine, consistent with due process, the 'essential question' of 'whether the inmate currently poses a threat to public safety.' (*Shaputis II, supra*, 53 Cal.4th at pp. 209, 220.) The Board answers this question by conducting 'an individualized inquiry' into the inmate's suitability for parole (*id.* at p. 219), 'draw[ing] . . . answers from the entire record, including the facts of the offense, the inmate's progress during incarceration, and the insight he or she has achieved into past behavior.' (*Id.* at p. 221, italics added.) It is required to give due consideration to the criteria referred to in [Penal Code] section 3041 and, more specifically, in [title 15], section 2402, [of the California Code of

Regulations] promulgated by the Board pursuant to legislative mandate. ([*In re*] *Prather* [(2010)] 50 Cal.4th [238,] 251 [Board 'must consider the statutory factors concerning parole suitability set forth in section 3041 as well as the Board regulations' (italics added)].)" (*In re Young* (2012) 204 Cal.App.4th 288, 302, fn. omitted.) As the California Supreme Court has explained, "The essential question in deciding whether to grant parole is whether the inmate currently poses a threat to public safety." (*Shaputis II, supra*, 53 Cal.4th at p. 220.)

In examining a decision of the Board, "a reviewing court focuses upon "some evidence" supporting the core statutory determination that a prisoner remains a current threat to public safety -- not merely "some evidence" supporting the Board's or the Governor's characterization of facts contained in the record. Specifically, . . . because the paramount consideration for both the Board and the Governor under the governing statutes is whether the inmate currently poses a threat to public safety, and because the inmate's due process interest in parole mandates a meaningful review of a decision denying parole, the proper articulation of the standard of review is whether there exists "some evidence" demonstrating that an inmate poses a current threat to public safety, rather than merely some evidence suggesting the existence of a statutory factor of unsuitability. (*Lawrence, supra*, 44 Cal.4th at p. 1191.)" (*In re Prather, supra*, 50 Cal.4th at pp. 251-252.)" (*Shaputis II, supra*, 53 Cal.4th at p. 209.)

Our review is deferential to the Board's decision because "under the 'some evidence' standard, '[o]nly a modicum of

evidence is required. Resolution of any conflicts in the evidence and the weight to be given the evidence are matters within the authority of [the Board or] the Governor. . . . [T]he precise manner in which the specified factors relevant to parole suitability are considered and balanced lies within the discretion of [the Board or] the Governor. . . . It is irrelevant that a court might determine that evidence in the record tending to establish suitability for parole far outweighs evidence demonstrating unsuitability for parole. As long as the . . . decision reflects due consideration of the specified factors as applied to the individual prisoner in accordance with applicable legal standards, the court's review is limited to ascertaining whether there is some evidence in the record that supports the . . . decision.' ([*In re*] *Rosenkrantz* [(2002)] 29 Cal.4th [616,] 677; see also *Lawrence*, *supra*, 44 Cal.4th at p. 1204; *Shaputis I*, *supra*, 44 Cal.4th at pp. 1260-1261.)" (*Shaputis II*, *supra*, 53 Cal.4th at p. 210.)

However, even under this deferential standard of review "the evidence supporting a parole unsuitability finding must be probative of the inmate's current dangerousness . . . ." (*Shaputis II*, *supra*, 53 Cal.4th at p. 211.) Thus, "when the evidence reflecting the inmate's present risk to public safety leads to but one conclusion may a court overturn a contrary decision by the Board or the Governor. In that circumstance the denial of parole is arbitrary and capricious, and amounts to a denial of due process. [Citation.]" (*Ibid.*)



## II

### *Evidence of Current Dangerousness*

Petitioner contends the Board's denial of parole lacks any evidence of current dangerousness in support. Specifically, he argues that (1) the Board's concerns about substance abuse are based on false premises that are not supported by the evidence, and (2) the Board improperly relied on static factors surrounding the commitment offense to deny parole. The contentions have merit.

#### A.

##### *Substance Abuse Concerns*

No evidence in the record suggests that petitioner ever had a substance abuse problem. All of the reports and evaluations conducted during petitioner's incarceration conclude that drugs and alcohol did not play any role in his commitment offense.

In 1983, the probation officer's report prepared for sentencing stated: "The defendant claimed moderate, social use of alcohol and no drug involvement whatever. These claims appear to be well substantiated by statements of people who knew him well." Likewise, petitioner's 1992 "Cumulative Category 'T' (Group Therapy) Record" touched on his consumption of alcohol and his use of marijuana at age 16 or 17, before noting that he did not demonstrate a history of substance abuse.

Until the Board's 2008 denial of parole, the record demonstrates uniform agreement that petitioner never had a substance abuse problem and that alcohol did not play a role in the commitment offense. Petitioner's 2009 psychological evaluation followed shortly after the Board denied parole in

2008 and urged him to participate in self-help programs addressing substance abuse and addiction.

Dr. Pritchard, the author of the 2009 evaluation, stated: "Substance abuse has never been identified as a particular problem for [petitioner]. He had some social drinking and experimental drug use in adolescence but the [probation officer's report] found, 'The [inmate] claimed moderate, social use of alcohol and no drug involvement whatever. These claims appear to be well substantiated by statements of people who knew him well.' He has no history of substance related infractions in [the Department of Corrections and Rehabilitation]." Rather than having any concerns about substance abuse, Dr. Pritchard concluded that among the "[f]actors which *decreased* his risk of recidivism included . . . no problems with alcohol and drugs . . . ." (Italics added.) Dr. Pritchard's conclusion that petitioner never had a substance abuse problem is consistent with the other psychological evaluations of petitioner in 2006 and 2001.

In this case, the Board rested its denial of parole principally on its speculation that petitioner might have a substance abuse problem. As we have noted, none of the psychological evaluations concluded that petitioner had a substance abuse problem or that alcohol and drugs played a role in the commitment offense. Our decision in petitioner's appeal from his original conviction for the commitment offense does not indicate that alcohol played any role in the murder of Greene. And, the probation officer's report noted that people who knew

petitioner well indicated he did not appear to have any substance abuse problem.

The People argue that the record does contain some evidence that substance abuse problems rendered petitioner currently dangerous. Specifically, the People point out that petitioner drank beer on the day of Greene's murder, petitioner had previously used drugs and alcohol, and he had associated with people who used methamphetamine.

Each of these factors relied upon by the People was considered and rejected in the psychological evaluations that concluded petitioner never had a substance abuse problem. Indeed, the only place in the record in which petitioner's consumption of beer on the day of the murder is mentioned is in the same section of the 2008 psychological evaluation that concluded "it would not seem that substance abuse was a factor in the commitment offense." Petitioner's past association with bikers who used amphetamines is mentioned in the 2001 psychological evaluation, which concluded that there was no evidence "to establish the presence of a substance abuse disorder, or a need for substance abuse treatment." Each of petitioner's three psychological evaluations noted that he had consumed alcohol and marijuana in the past. Nonetheless, the evaluations did not find that petitioner suffered a substance abuse problem, that drugs or alcohol played a part in the commitment offense, or that substance abuse constituted a risk factor for petitioner.

The People also note that Greene, the murder victim, was a drug dealer and that drugs were taken from him after his death.

The People contend the victim's dealing and stash of drugs provide some evidence to support concerns about substance abuse by petitioner.

The record shows that the events leading to the murder were motivated by the victim's use of a car previously owned by petitioner. Petitioner sold his car to the victim on the condition that the car would be used for parts. Petitioner believed the victim breached that condition by driving the car, which might have gotten petitioner into trouble due to lack of clear title to the vehicle. There is no evidence in the record that the murder was committed for the purpose of taking the drugs or that petitioner consumed any of the drugs taken from the victim.

Contrary to the Board's concern with petitioner's possible problems with alcohol and drugs, the evidence shows that petitioner does not have a substance abuse problem and that alcohol and drugs did not play a role in the commitment offense. Thus, the evidence leads to but one conclusion: petitioner cannot be deemed currently dangerous on the basis of substance abuse concerns.

#### **B.**

##### *Denial Based on the Circumstances of the Commitment Offense and Static Factors*

Although not the primary factor in its decision to deny parole, the Board began its decision by first considering the fact that Greene had been "beaten severely and then shot and killed and left at Bear Creek."

Later in the decision, the Board considered the trivial motive for the murder and petitioner's escalating criminality based on his juvenile record and unstable social history.

The People echo the Board's concerns by contending that the Board was correct to deny parole "based on the combination of the circumstances of the murder he committed" and his "negative history of criminality and instability." Petitioner responds that static factors regarding the commitment offense, his prior juvenile record, and unstable social history do not establish his dangerousness 27 years after his last conviction.

Petitioner clearly played an instrumental role in Greene's murder, as he acknowledged before the Board. Moreover, he did have an unstable social history when he was young and a juvenile record that included child molestation, two burglaries, truancy, threats against girlfriends, and two instances of absconding from youth camp placements. The last of these offenses -- the murder for which he received the indeterminate life term -- occurred more than 30 years ago.

As the California Supreme Court has held, the nature of the crime will not "eternally provide adequate support" for a parole denial. (*Lawrence, supra*, 44 Cal.4th at p. 1226.) For parole hearings, "the Legislature specifically contemplated both that the Board 'shall normally' grant a parole date, and that the passage of time and the related changes in a prisoner's mental attitude and demeanor are probative of the determination of current dangerousness." (*Ibid.*) Thus, "where the prisoner has served the suggested base term for his [or her] crime, 'the underlying circumstances of the commitment offense alone rarely

will provide a valid basis for denying parole when there is strong evidence of rehabilitation and no other evidence of current dangerousness.'" (*In re Criscione* (2009) 173 Cal.App.4th 60, 75, quoting *Lawrence, supra*, at p. 1211.)

The Board commended petitioner on remaining free from disciplinary actions since 1994 and on his excellent work history while incarcerated. Moreover, the Board found petitioner's expression of remorse to be genuine and that he was honest in answering its questions. The Board specifically recommended that petitioner continue to participate in AA and NA. The Board encouraged petitioner to continue to upgrade by participating in any educational, vocational, and self-help programs that might become available to him. The Board did not recommend that petitioner seek counseling or programs to address any other negative traits such as aggression or impulsiveness.

The Board's findings comport with the 2009 psychological evaluation, which concluded that petitioner "presents a **LOW RISK** for violence in the free community. Following the trend shown in the previous Board reports, he has continued to lower his dynamic risk factors and to demonstrate pro-social behavior and attitudes." The 2001 and 2006 evaluations rated him as low to moderate risk for recidivism. Thus, the record shows that petitioner's risk of violent behavior had been decreasing and reached a low level by the time of his 2009 parole hearing.

The Board did not offer any explanation that allows for a rational nexus to be drawn between the static factors surrounding Greene's murder, his juvenile record, an unstable social history, and a conclusion that petitioner is currently

dangerous. Mere recitation of the circumstances of the commitment offense, absent articulation of a rational nexus between those facts and current dangerousness, fails to provide the required modicum of evidence of unsuitability. (*Lawrence, supra*, 44 Cal.4th at pp. 1226-1227.) The Board also failed to articulate a rational nexus between petitioner's juvenile record and unstable social history when he was young *and* his current dangerousness. To the contrary, the Board commended petitioner for his honesty, genuine expression of remorse, remaining discipline-free for a long period of time, acquiring employment skills, the support of his family and parole plans, and the favorable psychological evaluation.

Mindful of the great deference to the Board and our limited review to look at the record to determine only whether a modicum of evidence supports the Board's decision, we conclude there is no evidence in the record to support the Board's denial of parole.<sup>3</sup>

Accordingly, we grant habeas corpus relief and remand this matter to the Board to conduct a new parole suitability hearing. (*In re Prather* (2010) 50 Cal.4th 238.) We note that "a judicial order granting habeas corpus relief implicitly precludes the Board from again denying parole -- unless some *additional* evidence (considered alone or in conjunction with other evidence in the record, and not already considered and

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<sup>3</sup> In light of our holding that petitioner is entitled to writ relief, we deny his motion for preliminary relief as moot.

rejected by the reviewing court) supports a determination that the prisoner remains currently dangerous.” (*Id.* at p. 258.)

DISPOSITION

The petition for writ of habeas corpus is granted, and this matter is remanded to the Board of Parole Hearings with orders to vacate its previous decision and promptly conduct a new parole suitability hearing in accordance with this opinion.

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HOCH, J.

We concur:

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BLEASE, Acting P. J.

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ROBIE, J.